IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-241

STATE OF MISSOURI,
Petitioner,

vs.

ALL STAR NEWS AGENCY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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OPINION BELOW

The opinion of the Supreme Court of Missouri reversing the judgments below is reported in *State v. All Star News Agency, Inc.*, 580 S.W.2d 245 (Mo. banc 1979).

JURISDICTION

Respondent accepts petitioner's jurisdictional statement.

QUESTION PRESENTED

Whether the total prohibition of All Star News Agency, Inc.'s ability to continue to sell and distribute magazines and movies from the time of the service of a Notice of Adversary Hearing

by the State constituted an illegal prior restraint of materials presumptively protected under the First Amendment in violation of the First, Fourth and Fourteenth Amendments.

STATEMENT OF THE CASE

This petition deals with a proceeding wherein the State of Missouri sought the forfeiture and destruction of one thousand films and thirteen thousand magazines from the premises of All Star News Agency of St. Louis, Inc. (hereinafter referred to as All Star) located at 3721 Washington Avenue, St. Louis, Missouri.

Briefly, the materials were seized pursuant to two search warrants, the first for the seizure of movies and the second for the seizure of magazines. Prior to the issuance of the warrants, Notice of Adversary Hearings were served on All Star and adversary hearings were conducted. Thereafter, the warrants were executed, seizures made, motions to quash the warrants were heard and overruled and the cases were consolidated for trial. Most of the items were shown to an advisory jury which declared almost all to be obscene. The Court then made an independent determination and agreed with jury's findings on all but a few items. He issued Declarations of Forfeiture and Orders for Destruction which were stayed pending appeal by All Star.

The relevant facts are as follows: On September 9, 1977, the State of Missouri requested the Circuit Court to issue a Notice of Adversary Hearing. The notice listed 153 magazines and movies by name. Item 154 was a general category which stated, ". . . and other magazines and motion picture films which depict, describe, or portray, pictorially, acts of sexual intercourse, . . ." The notice also stated that "intentional alteration, destruction or removal of any matter, or duplicate of matter described in the notice shall be subject to contempt of court proceedings." Pursuant to the provisions of Section 542.281, R.S. Mo. 1974, the notice was signed and it was served that same day on All Star (Tr. 4,22).

The adversary hearing began on September 19, 1977 (Tr. 2). Prior to the taking of testimony, counsel for All Star filed a Motion to Dismiss and Dissolve Notice of Adversary Hearing (Tr. 2-4) which was argued (Tr. 4-18) and overruled (Tr. 18). Testimony commenced on September 20 and various police officers and an investigator from the Circuit Attorney's office testified and filed written affidavits in support of their testimony (Tr. 23-94, 103, 112). During the course of the testimony the judge stated that he would not issue a search warrant for any materials which another circuit judge had under submission as a result of a prior mass seizure from All Star (Tr. 94-96, 98). Thereafter, the State withdrew its original application for a search warrant and filed an amended application (Tr. 101), which listed 10 brand names of films and a series of movies in each of the brands by number and contained an eleventh item which was a catch-all category. Exhibits numbered 43 through 52 were renumbered as A1 through A10 (Tr. 103-104). At the conclusion of the testimony, the judge viewed 10 movies, one each from series A1 through A10 (Tr. 114-116). Counsel for All Star objected to the issuance of the search warrant for other than the specific films viewed by the Court but the objection was overruled (Tr. 117-118). The Court ordered that the search warrant issue for the 10 films and the series to which they belonged and included a catch-all category for other films (Tr. 124, 252-254). After the hearing adjourned on September 21, 1977 (Tr. 126) 1000 films were seized pursuant to the search warrant. Except for the 10 films viewed by the judge (and any duplicates thereof), the other 990 films which were ultimately seized were not viewed during this adversary hearing, and they were not viewed by anyone until the jury saw them some months later.

Immediately following that hearing, on September 21, 1977, the State of Missouri requested that the Circuit Court issue another Notice of Adversary Hearing which was granted, assigned to a different judge and served on All Star that same day. This notice listed by name the same 117 magazines originally listed in the notice of the prior hearing (Tr. 133, 307-308). Item 118 was a general category which stated, ". . . and other magazines which depict, describe, or portray, pictorially, acts of sexual intercourse, . . .". As with the previous notices, this notice stated that intentional alteration, destruction or removal of any matter, or duplicate of matter, described in the notice would be subject to contempt of court proceedings. Police officers were stationed outside All Star's warehouse to insure that no material was removed.

The second adversary hearing began on September 23, 1977 (Tr. 127), and Counsel for All Star again filed a Motion to Dismiss and Dissolve Notice of Adversary Hearing which was argued and overruled (Tr. 127-149). Officers assigned to the St. Louis Police Department Vice Squad testified and filed written affidavits in support of their testimony (Tr. 190-236). An application for a search warrant was presented to the court (Tr. 190), and on September 29, 1977, the judge issued a search warrant which listed 117 magazines (Tr. 291). Of the 13,000 magazines ultimately seized, approximately twelve thousand nine hundred (12,900) magazines were neither viewed by the judge during this adversary hearing, nor were they listed specifically in the warrant, except for the few which may have been duplicates of the ones the judge did review.

The return on the search warrant for the seizure of movies was filed on September 29, 1977 (Tr. 259). On October 5, 1977 counsel for All Star filed a Motion to Quash the search warrant (Tr. 254-258) and the hearing held on October 7 (Tr. 259). Of the 10 brands of films listed in the warrant, officers seized movies of eight of the brands (Tr. 262-263). All

films found on the premises were seized (Tr. 255-256); none were viewed on the premises (Tr. 262-263,266). The decision to seize films not listed in the warrant was made after examining the boxes in which they were contained (Tr. 266-271). Also seized were reels of film contained in plastic cassettes (Tr. 276-277, 280), some of which were untitled and others which had pictures attached (Tr. 280, 282-283). At the conclusion of the hearing, the Motion to Quash was overruled (Tr. 290).

The return of the search warrant for the seizure of magazines was filed on October 6, 1977 (Tr. 291,306). On October 14, 1977 counsel for All Star filed a Motion to Quash the search warrant (Tr. 292-296) and the hearing on the motion disclosed the following facts: (Tr. 301) Detective Sergeant Vincent Stehlin testified that 12,955 magazines were seized (Tr. 304). Of these, there were 403 different magazines (Tr. 305). Only 43 of the 117 titles listed in the search warrant were found at All Star (Tr. 310). All the other magazines were seized under the general category. (Tr. 305).

Sergeant Stehlin stated that he was the one who made the decision as to which magazines were to be seized (Tr. 313). His procedure consisted of looking at some magazines for thirty seconds, and at some for four or five minutes (Tr. 315,409), skimming through the textual materials in the magazines (Tr. 315). If magazines contained what Sgt. Stehlin felt was deviant sexual acts or explicit pictorial acts of sexual intercourse, sodomy or masturbation they were seized (Tr. 316). He seized a magazine if it contained only one picture which he felt fell within the search warrant or violated state law (Tr. 417). Most of the stock of magazines was seized (Tr. 316) including some which were similar to ones declared not obscene by the Court in previous proceedings, (Tr. 317-319). At the conclusion of his testimony the Motion to Quash was overruled (Tr. 330).

The two cases were consolidated for purposes of trial before a third judge (Tr. 352-353). Voir dire examination was

conducted on November 17, 1977, and the presentation of evidence commenced on November 18 (Tr. 372). All Star preserved its objections to the introduction of the evidence at trial (Tr. 388-389, 430-432). It was during this three week jury trial that for the first time, the more than 12,000 magazines and 900 films seized by virtue of the general category in each of the two warrants were viewed.

The jury verdict declared most of the items to be obscene by less than unanimous verdicts (Tr. 520-532) and declared 8 exhibits not to be obscene. The jury was unable to return verdicts on 23 items (Tr. 532). These verdicts, some two and one-half months after the items were seized, constituted the first determinations as to the nature of the items seized pursuant to the general categories in both warrants.

After hearings were concluded on post-trial motions, Notices of Appeal were duly filed to the Missouri Supreme Court on February 3, 1978 (Tr. 563-565). The Supreme Court of Missouri en banc reversed and remanded in an opinion rendered April 10, 1979, holding that the procedures followed by the State constituted an illegal prior restraint of materials presumptively protected by the First Amendment of the Constitution of the United States. (see pages A3-A4 of Petitioner's Petition).

Thereafter, the State's Motion for Rehearing was denied, the Missouri Supreme Court issued its Mandate and all the items seized were returned to All Star.

ARGUMENT

> "I think the Notice guarantees that nothing is going to be shipped out." Mr. Hoag, Assistant Circuit Attorney (Tr. 14).

On September 9, 1977, a Notice of Adversary Hearing was served upon the "Owner-Manager-Employees of All Star News Agency". This notice contained 153 specifically delineated titles concerning magazine publications and movies. At the time of the service the notice also contained an item 154 which was in the nature of a "catch-all" phrase which shall be specified later herein. On September 21, 1977, a like notice was also served on All Star. This particular notice listed 117 specific items and contained an item 118 in the nature of a "catch-all" phrase. Both of these phrases and the notice that was served were identical. The notice in each instance went on to recite language paraphrasing § 542.281, paragraph 5, R.S.Mo., as follows:

> "Upon receipt of this Notice of Adversary Hearing, intentional alteration, destruction or removal of any matter, or duplicate of matter described in the Notice shall be subject to 'Contempt of Court' proceedings."

In each instance, the Order is signed by the Honorable Clyde S. Cahill, Jr., Judge of the Circuit Court. Both notices were served by Sgt. Vincent Stehlin. These two Notices of Adversary Hearing were not the first to be so served on All Star. On June 6, 1977, the first notice was served and a hearing was held. At the time the hearing on the instant notices commenced, the outcome of the hearing on the first notice and seizure had not yet been determined (Tr. 7). As a result of this second notice, All Star was effectively out of the movie business from September 9, 1977, until all of its stock of films was seized under the search warrant issued on September 21, 1977. It was put out of the magazine business from the time of the

second notice, September 9, until execution of the September 29 warrant when its stock of magazines was seized.

Sections 542.281 to 542.301, inclusive, R.S.Mo., are unconstitutional as they result in the imposition of an absolute prior restraint on materials which are presumptively protected, and afforded the protections under the First and Fourteenth Amendments of the Constitution of the United States and Article I, Section 8 of the Constitution of the State of Missouri. In *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973), this Court stated, ". . . prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness."

In the instant cases, specifically enumerated items were examined by the issuing judge, but the notice in each contained a general category, and this general category related back in language that is incapable of precise meaning. Not only did All Star face the potential threat of contempt of court for selling a magazine or movie that was not specifically named in the notice, as provided by Statute, supra, but its right to so traffic in these materials was totally restricted by the presence of police officers at the entrances and exits to the premises occupied by All Star. Furthermore, and perhaps most importantly, the great majority of the items finally seized were in the general category and were not examined by either a judge or a jury for several months after the initial seizure. During all this time, All Star was unable to sell the materials and the public was deprived of its right to obtain them. The Missouri Supreme Court realized that the approach the State took in this case was more effective than any injunction that could have been obtained. The procedure which was devised by the State was designed to side-step the procedural safeguards guaranteed to the respondent by the Constitution of the United States, as noted. The specificity requirement as set forth in *Miller v. California*, 413 U.S. 15 (1973), is definitive of the inadequacy of the general "catch-all"

provisions and their ultimate affect as contained in the notices in the case at bar.

In the landmark case of *Marcus v. Search Warrants*, 367 U.S. 717 (1961), this Court discussed the impropriety of a prior statutory procedure in Missouri which permitted a prior restraint of presumptively protected materials. The Court stated (l.c. 736-738):

> "But there is no doubt that an effective restraint—indeed the most effective restraint possible—was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor. An opportunity comparable to that which the distributor in Kingsley Books might have had to circulate the publication despite the interim restraint and then raise the claim of non-obscenity by way of defense to a prosecution for doing so was never afforded these appellants because the copies they possessed were taken away. Their ability to circulate their publications was left to the chance of securing other copies, themselves subject to mass seizure under other such warrants. The public's opportunity to obtain the publications was thus determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized. In addition to its unseemliness, we do not believe that this kind of enforced competition affords a reasonable likelihood that nonobscene publications, entitled to constitutional protection, will reach the public. A distributor may have every reason to believe that a publication is constitutionally protected and will be so held after judicial hearing, but his belief is unavailing as against the contrary judgment of the police officer who seizes it from him. Finally, a subdivision of the New York statute in Kingsley Books required that a judicial decision

on the merits of obscenity be made within two days of trial, which in turn was required to be within one day of the joinder of issue on the request for an injunction. In contrast, the Missouri statutory scheme drawn in question here has no limitation on the time within which decision must be made, only a provision for rapid trial of the issue of obscenity. *And in fact over two months elapsed between seizure and decision.* In these circumstances the restraint on the circalculation (sic) of publications was far more thoroughgoing and drastic than any restraint upheld by this Court in Kingsley Books." (Emphasis added)

The concept of the seizure itself is contrary to *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), in that before the final hearing all merchandise and items in question may be seized or effectively restrained from sale. The general inclusions of the "catch-all" category without any specificity to it creates a situation whereby there is not a determination of those matters until the ultimate jury trial. A period of time necessarily had to pass where the recipient of the notice is subject to the penalties of contempt based upon vague and imprecise descriptions of a category of material that he might sell at its own risk. However, in these cases the Petitioner removed even this possibility of continued circulation of books and films by placing police officers at all entrances and exits of the respondent's warehouse. True to the statement of the Assistant Circuit Attorney, supra, nothing was brought in or out throughout the pendency of the cases. The notices were served on September 21, 1977, but a final judgment was not rendered until January 11, 1978, in each case (Tr. 552 et seq.). Hence, contrary to Petitioner's assertions, there was in fact approximately four (4) months of total suppression even though some items were later found not obscene and protected. While it is now clear that the government can regulate the sale of obscene material, it is equally manifest it can do so only, ". . . under the procedural safeguards designed to obviate the dangers of censorship

system." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). One of the primary safeguards is a "prompt final judicial determination" that the material to be censored is, in fact, obscene. See also *Freedman v. Maryland*, 380 U.S. 51 (1965). In the absence of a prompt, prior judicial determination any action which abates or censors the exhibition of films or magazines violates the constitutional principle against prior restraint of presumptively protected material. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 367 (1971); *Freedman v. Maryland, supra*, at page 58; *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957).

Put very directly and simply, the sale or distribution of any material can not be restrained in any form or manner and especially by threat of contempt without a court first making a specific determination that the particular item, be it newspaper, magazine, film or any media, is obscene. Actual physical restraint compounds the constitutional invalidity of the procedure.

Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931), is directly on point. The statute in question in *Near* did not require approval of all publications before distribution. Rather, it allowed a court to enjoin the publication of a "malicious, scandalous and defamatory" newspaper (see page 702). The injunction was issued after Near had published nine (9) such newspapers. On appeal, the Supreme Court struck the statute down because it allowed a restraint of future publications based on the offensiveness of past publications. Similarly, here, the threat of contempt chilled the respondent's right to sell movies or magazines prior to any final determination of obscenity vel non.

The distinction between restraint based on judgment that specific material is obscene and prior restraint without such adjudication is clearly drawn in *Kingsley Books, Inc. v. Brown, supra* (l.c. 445):

"It only remains to say that the difference between *Near v. Minnesota*, 283 U.S. 697, 75 L.Ed. 1351, 51 S.Ct. 625, supra, and this case is glaring in fact. The two cases are no less glaringly different when judged by the appropriate criteria of constitutional law. *Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive*. In the language of Mr. Chief Justice Hughes, *'This is of the essence of censorship.'* 283 U.S. 713. As such, it was found *unconstitutional*. This was enough to condemn the statute wholly apart from the fact that the proceeding in *Near* involved no obscenity but matters deemed to be derogatory to a public officer. Unlike *Near*, Section 22-a concerned solely with obscenity and, as authoritatively construed, it *studiously withholds restraint upon matters not already published and not yet found to be offensive.*" (Emphasis added).

Beyond doubt, there is no "studious restraint upon matters not already published and not yet found to be offensive." Respondent is unable to impose any such constitutional restraint upon itself.

An examination of relevant decisions from other jurisdictions will show the blatant illegality of the procedure employed by the State. That these statutes may be employed by the Petitioner to "censor" and "restrain" future sales of books. magazines and films by threat of contempt of court and the use of police officers, and be allowed to so function for a period of some four (4) months before a final judicial determination is made was the compelling reason for the Missouri Supreme Court to find the statutes at bar, and the procedures employed, to be in violation of the First, Fourth and Fourteenth Amendments of the Constitution of the United States.

The facts in the cases at bar should be compared with those as discussed in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49

(1973), wherein those proceedings forbade the removal of films until the date of hearing but allowed their continued exhibition. The Court approved that scheme only because there was an allowed continued exhibition of the materials or films until such time as there was a prompt and final judicial determination. The decision of this Court in *Kingsley Books, supra*, stands for the proposition that books or films may not be enjoined until there has been an individual determination of obscenity. Accord: *Organization For a Better Austin v. Keefe*, 402 U.S. 415 (1971). The result of Petitioner's actions was to reverse the concept of presumptive protection of First Amendment materials to censorship by the State pending judicial affirmation, an action which the Supreme Court of Missouri recognized as improper.

In its brief, Petitioner argues that the recent decision of this Court in *Lo-Ji Sales, Inc. v. New York*, — U.S. —, 99 S. Ct. 2319 (1979) would not control on remand. Respondent would strenuously disagree. This issue was briefed and argued in the Missouri Supreme Court, but the Court did not reach the issue in rendering its opinion.

In the instant case, as in *Lo-Ji, supra*, the great majority of the materials were not specifically listed in the search warrant. Rather than have a determination of obscenity vel non made by a neutral, detached judicial officer, Sgt. Vincent Stehlin of the Vice Squad exercised his discretion in determining which materials would be seized.

This Court has previously declared improper a Missouri search warrant which contained catchall language because it did not provide adequate safeguards to insure against the seizure of non-obscene materials. In *Marcus v. Search Warrant*, 367 U.S. 717 (1961), the Court distinguished the procedure approved in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957) from the warrants issued by the Missouri Courts. The Court stated (l.c. 735):

> "*Second*, the restraints in Kingsley Books, both temporary and permanent, ran only against the named publication; no catchall of all 'obscene' material was imposed on the defendants there, comparable to the warrants here which authorized a mass seizure and the removal of a broad range of items from circulation."

See also, the opinion of the Louisiana Supreme Court in *Parish of Jefferson v. Bayou Landing Ltd., Inc.*, 350 S.2d 158 (1977) and *In Re Search Warrant of Property, Etc.*, 369 S.W.2d 155 (Mo.1963).

The search warrants issued in the instant cases were nearly identical to the *Lo-Ji* warrant. Each warrant contained an enumerated list of items but then included a general category which in each instance began with the vague and overbroad clause, "and other magazines (films) . . .". One warrant listed 117 items and the other only 10 titles. Yet the executing officers used these warrants as issued to seize 12,955 magazines (Tr. 304) and 1,000 films (Tr. 385). By admission some 360 magazine titles, of a total of 403 titles, and all copies thereof although not enumerated were seized. (Tr. 305). This was not a search for the materials specifically listed in the warrants. The executing officer used the general category of the warrant as a justification to replace the ruling of the trial court with his own discretion in interpreting the warrant. When asked why additional magazines were seized, the testimony was, "Because in my opinion they fell within the scope of the warrant." (Tr. 305).

In *Lo-Ji*, this Court stated (l.c. 99 S.Ct.2324):

> ". . . the warrant left it entirely to the discretion of the officials conducting the search to decide what items were likely obscene and to accomplish their seizure. The Fourth Amendment does not permit such action. *Roaden v. Kentucky*, 413 U.S. 496, 502, 93 S.Ct. 2796, 2800, 37 L.

> Ed.2d 737 (1973); *Stanford v. Texas, supra*, 379 U.S. at 485, 85 S.Ct., at 511; *Marcus v. Search Warrant, supra*, 367 U.S., at 732, 81 S.Ct., at 1716."

Because it held that there was an illegal prior restraint the Missouri Supreme Court did not reach the merits of respondent's contentions that the search and seizure herein was clearly improper. Should this Court grant petitioner's Writ of Certiorari and remand the case to the Missouri Supreme Court, respondent submits that *Lo-Ji Sales, Inc. v. New York, supra*, would be controlling.

CONCLUSION

For the foregoing reasons, we respectfully suggest that the Petition for Certiorari be denied.

Respectfully submitted,

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